Filed 9/8/15 Grant v. Fountain Valley Reg. Hospital CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| CHRISTINE GRANT,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER et al.,<br><br>Defendants and Respondents. | G049775<br><br>(Super. Ct. No. 30-2013-00631443)<br><br>O P I N I O N |

Appeals from judgments of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed. Motion to augment the record on appeal. Granted.

Christine Grant, in pro. per., for Plaintiff and Appellant.

Murchison & Cumming, David A. Winkle and Terry L. Kesinger for Defendant and Respondent Fountain Valley Regional Hospital and Medical Center.

Schmid & Voiles, Denise H. Greer and William E. Gitt for Defendant and Respondent Sarah Nghiem.

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## INTRODUCTION

Five days after being admitted to Fountain Valley Regional Hospital and Medical Center (the Hospital), 40-year-old Michael Magana died. Magana's mother, Christine Grant, sued the Hospital and Sarah Nghiem, D.O., Magana's admitting physician, for wrongful death. The trial court granted motions for summary judgment filed by the Hospital and by Dr. Nghiem. We affirm.

The motions made prima facie showings of the lack of a triable issue of material fact as to breach of duty and causation. Both motions were supported by expert medical opinions. Grant's oppositions to the motions were supported only by her own lay opinion. The trial court did not err in granting the motions for summary judgment.

Grant also challenges the trial court's order denying her motion to compel documents from the Hospital. We conclude the trial court did not prejudicially err in denying the motion.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

Magana suffered injuries in an off-road motorcycle accident, for which he sought treatment at the Hospital on February 1, 2009. Magana signed a conditions of services agreement after arriving at the Hospital's emergency room. Magana, who was awake and alert, complained of left shoulder and rib pain. The emergency room doctor diagnosed him with multiple rib fractures and a scapular fracture.

Dr. Nghiem admitted Magana to the Hospital, with an admitting "problem list" of blunt head trauma, multiple rib fractures, a scapular fracture, degenerative cervical spinal disease, hypertension, obesity, leukocytosis, hypokalemia, and elevated creatinine. She requested an orthopedic consultation. On February 2, the orthopedic specialist (Dr. Christopher Ninh) recommended nonoperative treatment, monitoring for a collapsed lung, pain control, and physical therapy.

Magana was evaluated by a cardiothoracic surgeon, Dr. Quang Vo, on February 3, at Dr. Nghiem's request. Dr. Vo noted Magana was morbidly obese and suffered from hypertension. He diagnosed Magana with a joint separation, pulmonary contusion, and fluid in the left pleural space. Dr. Vo did not believe surgical intervention was necessary, and recommended that Magana be provided with incentive spirometry and chest physiotherapy, and have his oxygen saturation level monitored. On the next day, February 4, Dr. John Belville inserted a pigtail drain in Magana's chest to address the left pleural effusion.

On February 5, Dr. Nghiem requested a nephrology consultation. Dr. Sandeep Dang, the nephrologist, diagnosed Magana with acute renal failure, and recommended a catheter be inserted, intravenous fluids given, and a renal ultrasound be done and a Doppler study performed to ensure renal flow. On the same date, Magana was seen by Dr. Hoang Le, a pulmonary specialist, also at Dr. Nghiem's request. Dr. Le ordered placement of a nasal gastric tube, a Doppler ultrasound, a ventilation-perfusion scan, and noninvasive ventilation via a bilevel positive airway pressure machine. Dr. Le noted that Magana presented "a relatively complex clinical situation."

On February 6, after Magana became hypotensive, Dr. Nghiem requested a surgical consultation by Dr. Thang Nguyen. Dr. Nguyen decided to perform an exploratory laparotomy (an incision through the abdominal wall to gain access to the abdominal cavity). While Magana was being anesthetized and intubated for surgery, he went into cardiac arrest and died.

Grant filed a complaint for wrongful death and negligence on February 5, 2010, in the Superior Court of San Joaquin County. That court granted the Hospital's motion to change venue, and the case was transferred to the Orange County Superior Court in February 2013.

Dr. Nghiem and the Hospital filed separate motions for summary judgment. Grant filed opposition to the motions. The trial court granted both motions for summary

judgment, and entered two separate judgments against Grant, one in favor of Dr. Nghiem and the other in favor of the Hospital. Grant timely appealed from both judgments.

## DISCUSSION

### I.

### *STANDARD OF REVIEW AND ELEMENTS OF CAUSE OF ACTION FOR WRONGFUL DEATH BASED ON NEGLIGENCE*

"[T]he party moving for summary judgment bears the burden of persuasion" that there are no triable issues of material fact and that the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party also "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists

as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

"The elements of a cause of action for wrongful death are a tort, such as negligence, and resulting death. [Citation.] The elements of a negligence cause of action are duty to use due care and breach of duty, which proximately causes injury." (*Lopez v. City of Los Angeles* (2011) 196 Cal.App.4th 675, 685.)

Healthcare providers must possess and exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36.) "Significantly, '"'[t]he standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman.' [Citations.]"' [Citation.]" (*Morton v. Thousand Oaks Surgical Hospital* (2010) 187 Cal.App.4th 926, 935.) "'Expert evidence in a malpractice suit is conclusive as to the proof of the prevailing standard of skill and learning in the locality and of the propriety of particular conduct by the practitioner in particular instances because such standard and skill is not a matter of general knowledge and can only be supplied by expert testimony. [Citations.]'" (*Willard v. Hagemeister* (1981) 121 Cal.App.3d 406, 412.)

## II.

### *THE HOSPITAL'S MOTION FOR SUMMARY JUDGMENT*

In its motion papers, the Hospital met its initial burden of making a prima facie showing that there were no triable issues of material fact as to breach of duty and causation, and that it was entitled to summary judgment of Grant's cause of action for wrongful death based on negligence. Specifically, the Hospital established (1) none of the doctors who treated Magana was its employee or agent, and (2) the care provided

to Magana by the Hospital's employees and agents satisfied the requisite standard of care and did not contribute to Magana's death. As to the first point, the Hospital offered the conditions of services agreement signed by Magana, which states that the physicians providing care to patients are not the Hospital's employees or agents, and the declaration of the Hospital's human resources director, who declared that all physicians providing care to Magana were independent contractors, not employees, of the Hospital. Grant's response was to state that Magana was given powerful drugs in the emergency room, which might have impaired his judgment to understand the conditions of services agreement. This evidence is speculative, however, and did not raise a triable issue of material fact.

As to the second point, the Hospital offered in evidence Magana's medical records, as well as the declaration of Dr. Michael Lekawa, its expert witness on whether the Hospital satisfied the duty of care toward Magana and whether the Hospital's acts and omissions caused Magana's death. Based on his review of Magana's medical records and Grant's complaint, and his professional training and experience, Dr. Lekawa opined that "the nursing and non-physician staff at [the Hospital] satisfied the requisite standard of professional care in the Southern California community for acute care hospitals in relation to the care and treatment they provided to Michael Magana during his February 1-6, 2009 admission, and did not cause or contribute to this patient's death." The Hospital met its initial burden of proof on the motion for summary judgment as to the elements of breach of duty and causation.

Grant's opposition to the motion for summary judgment consisted only of her own declaration purporting to interpret Magana's medical records. Expert evidence as to the standard of care in a medical malpractice case is conclusive, and, subject to an exception discussed *post*, the lack of a plaintiff's expert to counter admissible evidence from a defendant's expert is fatal to the plaintiff's case. (*Willard v. Hagemeister*, *supra*,

121 Cal.App.3d at p. 412.) Absent an expert declaration to counter that offered by the Hospital, summary judgment was properly granted in favor of the Hospital.

Procedurally, this case is very similar to *Willard v. Hagemeister*, *supra*, 121 Cal.App.3d at pages 413-414: "It is important to note that more than two years elapsed between the filing of appellant's first amended complaint in this action and the trial court hearing on the initial motion for summary judgment . . . . During this period appellant not only failed to obtain an expert evaluation regarding any alleged malpractice, but also offered only her personal opinion that each respondent was somehow negligent. It is difficult to see how respondents in this case could have made a more definite showing in negation of the negligence charge against them. [¶] Through the parties' declarations in this case, the summary judgment procedure indicates that appellant does not possess evidence of respondents' alleged malpractice which demands the analysis of trial."

In the present case, almost four years passed between the filing of the original complaint and the hearing on the motion for summary judgment. Grant had not obtained an expert's opinion on the case, and her only evidence in opposition to the motion for summary judgment was her personal opinion that the Hospital was negligent. As with the plaintiff in *Willard v. Hagemeister*, the summary judgment process has shown Grant does not have evidence of the Hospital's negligence.

Grant argues that the common knowledge exception to the rule that an expert's opinion is conclusive applies in this case. "The 'common knowledge' exception is principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur, i.e., when a layperson 'is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.' [Citation.] The classic example, of course, is the X-ray revealing a scalpel left in the patient's body following surgery. [Citation.] Otherwise, '"expert evidence is conclusive and cannot be

disregarded. [Citations.]"' [Citation.]" (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001, fn. omitted.)

This case, however, does not call for an opinion as to whether a medical instrument was improperly left in a patient's body, or anything remotely similar. This case involves determinations whether the treatment provided to Magana was appropriate and necessary and was properly administered, and whether Magana should have been transferred to another facility for additional or different treatment. A review of the evidence shows this is not the type of situation in which the common knowledge exception could apply. (See *Bardessono v. Michels* (1970) 3 Cal.3d 780, 792-793 [jury could rely on common knowledge where alleged malpractice involved simple procedure of normal treatment for commonplace problem but where untoward, extremely rare result occurred]; *Davis v. Memorial Hospital* (1962) 58 Cal.2d 815, 818 [trial court erred in failing to instruct jury on res ipsa loquitur when it was matter of common knowledge that procedure is not ordinarily harmful in the absence of negligence].)

Grant focuses on a chest tube that she contends was improperly placed, and for which informed consent was not obtained, in claiming that the common knowledge exception should apply. The medical records establish that the chest tube was placed after Magana's condition became critical in the operating room on February 6. The Hospital's records show, via Dr. Nguyen's dictation, that a chest tube was placed on the left side of Magana's chest. The autopsy report references a chest tube on the right side. Presumably, one of those references is incorrect, but we have no way of knowing which one. (Photographs of the autopsy, if any were taken, are not a part of the appellate record. Other contemporaneous documents in the medical records submitted in support of Dr. Nghiem's motion for summary judgment refer specifically to a *left* chest tube being placed.) Magana's written, informed consent to the surgical procedure included consent to "any different or further procedures which, in the opinion of the doctor(s) performing the procedure, may be indicated due to any emergency." Nothing in the

appellate record shows that the placement of Magana's chest tube, on the basis of res ipsa loquitur, was below the standard of care, or that it caused or contributed to his death.

Grant also argues that the trial court erred by failing to consider the undisputed evidence of the Hospital's negligence. Grant provides a long list of references to Magana's medical records, which she claims were incompletely charted. As a layperson, Grant is incapable of opining that the incomplete medical records constituted a breach of duty, much less that they were the cause of Magana's death.

Grant argues generally that she has a constitutional right to a jury trial, and the trial court deprived her of that right by granting the motions for summary judgment. When the proper procedures for summary judgment are followed, as they were here, no right to trial is violated by the disposition of a case by means of summary judgment. (*Bank of America, etc., v. Oil Well S. Co.* (1936) 12 Cal.App.2d 265, 270 [rejecting argument that granting summary judgment under Code of Civil Procedure section 437c violates the constitutional right to trial by jury].)

III.

*DR. NGHIEM'S MOTION FOR SUMMARY JUDGMENT*

Code of Civil Procedure section 437c, subdivision (b)(1) requires that a motion for summary judgment must "include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. *Each of the material facts stated shall be followed by a reference to the supporting evidence*. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion." (Italics added.) Each and every statement of undisputed material fact in Dr. Nghiem's separate statement is supported only by a reference to the declaration of Dr. Nghiem's expert witness, Dr. Jeffrey P. Salberg. The expert witness's summary of the medical records he reviewed, however, is not admissible evidence. The separate statement is therefore defective.

This error might have been fatal to Dr. Nghiem's motion for summary judgment. It has been held, "'[t]his is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*.'" (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) However, a panel of this court, in *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315, rejected such an absolute prohibition against consideration of evidence not referenced in the separate statement. Instead, this court concluded that the language of Code of Civil Procedure section 437c, subdivision (b)(1) gives the trial court the discretion to consider evidence not referenced in the moving party's separate statement; this court reviews that decision for abuse of discretion. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra*, at p. 316.)

Magana's medical records, relied on by Dr. Salberg, and the authentication of those records by the Hospital's custodian of records, were included in a compact disk (CD) attached as an exhibit to the declaration of trial counsel, William Gitt, in support of Dr. Nghiem's motion for summary judgment.[1] The trial court obviously exercised its discretion to consider the evidence not referenced in the separate statement. The court's minute order specifies that the court considered all evidence presented, as well as the parties' written and oral arguments. Because the evidence was before the trial court and there was no confusion as to what evidence was being relied on, we conclude the trial court did not abuse its discretion.[2]

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[1] The CD was not included in the appellate record. Dr. Nghiem therefore filed a motion to augment the record on appeal. Because the CD was lodged with the trial court in connection with the motion for summary judgment, it is an appropriate matter with which to augment the appellate record. (Cal. Rules of Court, rule 8.155(a)(1)(A).) We grant the motion to augment the record on appeal with the CD attached to the motion.

[2] We nevertheless caution counsel that this is not the appropriate means of preparing a separate statement in support of a motion for summary judgment or summary adjudication.

As with the Hospital's motion for summary judgment, Dr. Nghiem's motion was supported by the declaration of an expert witness, Dr. Salberg, who opined, based on Magana's medical records, relevant pleadings and discovery responses, Magana's autopsy report, and Dr. Salberg's own experience and training, that the medical care provided to Magana by Dr. Nghiem did not breach the duty of care ordinarily exercised by a doctor of Dr. Nghiem's training and experience in the community. Dr. Salberg further opined that nothing Dr. Nghiem did or failed to do in the care and treatment of Magana caused or contributed to Magana's death. Grant failed to offer any expert testimony to counter Dr. Salberg's declaration; instead, Grant relied solely on her own declaration that Dr. Nghiem's treatment fell below the applicable standard of care. The trial court did not err in granting Dr. Nghiem's motion for summary judgment. (*Willard v. Hagemeister*, *supra*, 121 Cal.App.3d at p. 412.)

Grant argues that Dr. Nghiem's motion for summary judgment was improperly granted because Dr. Salberg opined that Dr. Nghiem *did* cause or contribute to Magana's death. Dr. Salberg's declaration reads, in relevant part: "It is also my professional opinion to a reasonable degree of medical probability, based on my review of the medical records, autopsy report, and responses of Ms. Christine Grant to written discovery which I have reviewed to date, that the medical care and treatment provided to Mr. Michael L. Magana by Sarah Nghiem, D.O. during his hospitalization at Fountain Valley Regional Hospital and Medical Center from February 1, 2009 to February 6, 2009 *did not cause or contribute to causing his death* on February 6, 2009." (Italics added.) In a supplemental declaration correcting a statement about when Dr. Nghiem became responsible for overseeing Magana's care, Dr. Salberg wrote: "This correction in my original declaration *does not change my opinions* addressing the issues of standard of care or causation as stated in my original declaration in support of the Motion for Summary Judgment by defendant, Sarah Nghiem, D.O. The fact that Dr. Nghiem admitted Mr. Magana to the hospital on February 1, 2009 *does not change my opinion*

that the medical care and treatment Dr. Nghiem provided to Mr. Magana during his February 1 through 6, 2009 hospitalization at Fountain Valley Regional Hospital and Medical Center complied with the standard of care and *did cause or contribute to the cause of Mr. Magana's death*." (Italics added.) It is obvious that the supplemental declaration contained a typographical error by omitting the word "not" from the last sentence. We do not accept Grant's contention that Dr. Salberg changed his opinion as to causation.

We also reject Grant's argument that *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742-743, requires that the judgment in favor of Dr. Nghiem be reversed. In that case, the appellate court concluded the trial court erred by granting summary judgment in a medical malpractice case based solely on the declaration of the defendant's expert witness. (*Ibid.*) The medical records that were the basis of the expert's opinions in *Garibay v. Hemmat* were not part of the moving party's papers. (*Ibid.*) In the present case, by contrast, the medical records, on which Dr. Salberg relied, were on a CD attached as an exhibit to the declaration of counsel, and made a part of Dr. Nghiem's moving papers.

## IV.

### *MOTION TO COMPEL*

Grant also challenges the trial court's order denying her motion to compel production by the Hospital of (1) emergency room protocol for trauma patients and (2) Magana's X-rays. The trial court denied the motion to compel because Grant had failed to establish good cause for the discovery sought. We review the trial court's ruling on the motion to compel discovery for abuse of discretion. (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 110.)

As to the production of emergency room protocol for trauma patients, Grant's original request demanded: "Any and all Emergency Department specific policies; procedures; guidelines; administrative by-laws; protocols of Fountain Valley

Regional Hospital & Medical Center from February 01, 2009 to February 06, 2009 that were in place for Trauma and Chest trauma patients." In her motion to compel, Grant explained why a further response should be ordered: "Defendants produced a copy of an Emergency Nurses Association (ENA) and Trauma Nursing Core Course (TNCC) criteria, this is a Provider Course for Nurses with limited emergency nursing clinical experience, who works in a hospital with limited access to trauma patients, which is a 20-hour course. Defendants Protocol was Fabricated from information on the Website for 'Trauma Nursing Core Course (TNCC)' a Provider Manual. The Defendants Fabricated Protocol did not include the procedures, guidelines or treatment plan in the Emergency Department for the attending physicians. C.C.P. § 2032.640. [¶] Defendants, Fountain Valley Regional Hospital is an Acute Hospital; according to the California Health & Safety [Code] § 1317 the Emergency Department of an Acute Hospital must have the appropriate facility and qualified personnel available to provide the services or care. Defendants, Fountain Valley Regional Hospital was not a Trauma Facility, the medical staff; independent physicians, nurses and technicians were not Trauma Trained. [¶] Defendants, Fountain Valley Regional Hospital Emergency Department provided a Fabricated Protocol which is not in compliance with Tenet Regulatory Compliance Policy Protocol. This evidence is to refute the allegations, that Defendant, Fountain Valley Regional Hospital Protocol is in fact, Artificial and Deceptive. [¶] Plaintiff moves to compel production of . . . a Valid Protocol that is within compliance with Tenet Regulatory Compliance Policy for Fountain Valley Regional Hospital Emergency Department. [¶] . . . The Authentic Protocol is relevant to the liable cause of action because Defendants, Fountain Valley Regional Hospital Emergency Department medical staff; independent physicians, nurses and technicians failed in compliance with Tenet Regulatory Compliance Policy Protocol, to stabilize (decedent), Michael Magana and transfer him to a Trauma Facility. (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 292.). [¶] . . . The Authentic Protocol is relevant to the liable cause of action

because Defendants, Fountain Valley Regional Hospital Emergency Department medical staff; independent physicians, nurses and technicians failed to perform in compliance with Defendants Protocol, which is relevant to their breach of duty."

The court denied the motion, ruling: "The defendant['s] position that this demand is poorly drafted and it is unclear what documents plaintiff is actually seeking is well taken. Defendant produced what it thought was a responsive document. M[oving] P[arty] has not established good cause. Plaintiff needs to redraft this request." We find no abuse of discretion in the court's ruling.

As to Magana's X-rays, Grant's original request for production was grossly overbroad, asking for "[a]ny and all medical records," without limiting the documents sought to Magana. The Hospital properly objected to the request. During the meet-and-confer process, Grant narrowed her request to "any and all [of] Michael Magana's medical records on micro film, disk, scans, arteriograms, nuclear scans and X-Rays. Seeks information which is relevant and calculated to lead to the discovery of admissible evidence at trial. The X-Rays, Arteriograms, Nuclear scans were NOT mailed with the defendants copy of Michael Magana's medical records with their response on Set One of Special Interrogatories as Exhibit 'A' on a CD. This information is imperative for expert assessment." The Hospital objected to the revised document request, claiming it contained confusing subparts, called for information with no relevance to the present case, and potentially called for information protected by the attorney-client privilege and the attorney work-product doctrine.

The trial court ruled that the Hospital's objections were well taken. "This demand is not limited in time, it is not limited to any particular hospital department, nor is it limited to any particular patient, such as decedent. There is also no subject matter identified in the demand to which the documents sought are supposed to relate. This demand seeks any and all types of medical records and medical reports that defendant may generate in the medical center. In essence, plaintiff seeks the 'kitchen sink.' The

demand is compound as well. Plaintiff has not established good cause for such an overreaching document demand." While the court's analysis would be correct vis-à-vis the original document request, it was incorrect with regard to the narrowed request following the parties' meet-and-confer process. The demand for Magana's X-rays and other similar medical records was not confusing, called for material relevant to Grant's wrongful death claim, and did not call for privileged information. The trial court abused its discretion in denying the motion to compel those materials.

Grant, however, has failed to establish any prejudice. "Because plaintiffs did not seek writ review of the trial court's denial of their motion to compel, and instead sought review only on appeal from the judgment that followed defendants' successful summary judgment motions, they must show not only that the trial court erred, but also that the error was prejudicial; i.e., they must show that it is reasonably probable the trial court would not have granted summary judgment against them if the court had granted their motion to compel. [Citation.]" (*Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 740.) We explained, *ante*, that the trial court properly granted the motions for summary judgment because the uncontradicted declarations of the Hospital's and Dr. Nghiem's expert witnesses were conclusive evidence of the lack of breach of duty and causation. Grant cannot show it is reasonably probable that having the X-rays and other materials sought by this request would have changed that result.

In denying the motion to compel, the trial court advised Grant that she could resubmit proper discovery requests to the Hospital, and that the court would continue the hearing on the motions for summary judgment if Grant had outstanding discovery that she needed to oppose the motions. No further discovery requests to the Hospital appear in the appellate record, however.

## DISPOSITION

The judgments are affirmed. Respondents to recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.